

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

ESSEX P.B. & R. CORP.,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:08CV01705 ERW
	)	
XCAPER INDUSTRIES, LLC,	)	
	)	
Defendant.	)	

**MEMORANDUM AND ORDER**

This matter comes before the Court on Plaintiff Essex P. B. & R. Corp.'s Voluntary Motion to Dismiss, or in the Alternative, Motion to Amend the Court's Case Management Order [doc. #17].

This Court held a hearing on June 17, 2009, regarding Plaintiff's Motion to Dismiss and several other pending motions in this case. During the course of the hearing, counsel for Defendant mentioned the use of a covenant not to sue in a similar case that was heard by Judge Charles A. Shaw, of the United States District Court for the Eastern District of Missouri. *See Furminator, Inc. v. Ontel Prods. Corp.*, 246 F.R.D. 579 (E.D. Mo. 2007). In response, counsel for Plaintiff expressed some willingness to consider crafting a covenant not to sue in this case. As a result, this Court issued an Order on June 19, 2009, in which the Parties were invited to have a discussion on whether they have an interest in ultimately executing a covenant not to sue provision that would protect the interests of the respective parties. The Parties were instructed to notify the Court by Friday, July 10, 2009, of the status of the dispute and their willingness to enter a covenant not to sue agreement.


On July 10, 2009 and July 13, 2009, both Parties submitted briefs regarding the status of a possible covenant not to sue agreement. Upon reviewing these briefs, it is clear to the Court that the Parties are unable to reach an accord with respect to a covenant not to sue agreement that might assist in the disposition of this case. As noted in the June 19, 2009 Order, this absence of accord means that the Court will now proceed with the pending Motions.

It is the intention of the Court at this time to allow Defendant the opportunity to submit a claim for attorney's fees and costs, to allow Plaintiff to object to payment of such fees and costs, and to determine the amount of Defendant's attorney's fees and costs, if any. Thereafter, the Court expects to award Defendant an amount of fees and costs and to grant Plaintiff's Motion to Dismiss this case without prejudice. The hearing will be held on Wednesday, July 22, 2009, at 3:00 p.m. The Court will also address Defendant's Motion for Sanctions [doc. #30] at the July 22, 2009 hearing.

Accordingly,

**IT IS HEREBY ORDERED** that counsel for Plaintiff and Defendant shall appear at a hearing on **Wednesday, July 22, 2009**, at **3:00 p.m.** in Courtroom 12S.

Dated this 14th Day of July, 2009.

  
E. RICHARD WEBBER  
UNITED STATES DISTRICT JUDGE